88-746

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

HENRY ADAMS, ET AL.,

Petitioners,

v.

THE BUDD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals incorrectly applied precedent of this court established in Vaca v. Sipes and issued an opinion which conflicted with the other circuits as to the standard necessary to show that the union breached its duty to fairly represent its members.

2. Whether the panel decision of the Seventh Circuit Court of Appeals incorrectly applied precedent of that court and violated the doctrine of stare decisis by its failure to follow binding precedent from this court and from within the circuit in holding that repeated violation by the company of an employee's preferential hiring rights, coupled with repeated refusals by the union to process his/her seperate grievances, could not amount to a continuing violation of Section 301 which would render timely and actionable violations occurring more than six months prior to the filing of that employee's action so long as the latest of such repeated violations occurred within six months of the time the action was fileo.

LIST OF PARTIES

Petitioners:

Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry, Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Howard Donald, Lillie K. Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, Jerome Nedoff, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Weems, Sr., Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk.

Respondents:

The Budd Company, and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and Its Local No. 1122

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v.

THE BUDD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit (App. A., infra) denying Petitioners' Petition for Rehearing is not reported. The judgment and opinion of the United States Court of Appeals for the Seventh Circuit (App. B, infra) is not reported. The order of the District Court denying Petitioners' Motion To Amend And/Or Alter Judgment (Appx. C, infra) is not reported. The judgment and order of the United States District Court for the Northern District of Indiana, Hammond Division, (App. D, infra) is not reported.

JURISDICTION

The Order of the United States Court of

Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on May 5, 1988. The Order of the United States Court of Appeals oenying the Petition for rehearing was entered on July 6, 1988. The jurisciction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act ("Section 301"), 29 U.S.C. Section 185(a) provides in part as follows:

"(b) Responsibility for acts of agent-Entity for purpose of suit-Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agenty. Any such labor organization may sue or be sued as an entity and in

behalf of the employees whom it represents in the courts of the United States. Any money Judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT OF THE CASE

This is an action arising under and jurisdiction is conferred by, Section 301 of the Labor/Management Relations Act of 1947, as amended, 61 Stat. 186, as amended 29 U.S.C. Section 185, as amended, hereinafter, the (LMRA). [Appx. 1, pg. 2]

The Plaintiffs, each and all, are former employees of the Budd Company, Gary, Indiana facility, and former members of Local 1122 of the International Union, UAW. The individual plaintiffs are as follows: Henry C. Adams, Jr., Willie Ballard, Robert Bernal, George Berry,

Willie Bingham, Joyce Clark, Willie J. Cornelius, Joseph Cruz, Louis Cruz, Jr., Michael Dawson, Howard Donald, Lillie K. Donald, Carolyn Gilbert, Curtis Humphrey, L.M. Jackson, Leon Jenkins, Bennie Kennedy, Ronald Leggett, Melvin Montgomery, Jerome Nedoff, Melvin R. Page, John W. Perkins, Willie H. Smith, Malcolm Tucker, Jerome Tyron, Robert Weems, Sr., Emanuel Williams, Leroy Williams, Milton Wilson and Alfred D. Volk. [Appx. 1, pg. 3]

The Defendant Budd Company was a Delaware corporation headquartered in Detroit, Michigan and engaged in the manufacturing of automobile and truck body components. The Budd Company had facilities at Hunting Park Plant, Red Lion Plant, Johnson City, Tennessee Plant, Quinton, Michigan Plant, Detroit, Michigan Plant, and the Ashland, Ohio Plant. [Appx.1, pg. 3]

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization that represented employees at all the Budd Company facilities. [Appx. 1, pg. 4]

Local 1122 of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, was a labor organization of employees, affiliated with the International Union, and negotiated and entered into collective bargaining agreements on behalf of the covered employees of the Budd Company, Gary facility. [Appx. 1, pg. 4] On or about February 2, 1980, the Budd Company, on behalf of all its plants, and the International Union, UAW, and its affiliated locals, including Local 1122, entered into a collective bargaining agreement, covering wages hours,

and other terms and conditions of employment. [Appx. 1, pg. 4] In contemplation of closing its Red Lion and Gary facilities, the Budd Company and the International Union, UAW negotiated a preferential hiring agreement (PHA). [Appx. 1, pg. 15] This agreement provided that UAW/covered employees who are displaced from employment because of the closing of a plant covered by the National Agreement, be given preference over other applicants. [Appx. 1, pg. 9] The Budd Company, Gary facility, ceased production in October of 1982, but the maintenance functions continued until December of 1982. [Appx. 8, pg. 87]

The Plaintiffs were all laid off at various times between the years of 1979 and 1980 from the Budd Company and were never recalled. [Appx. 22, pg. 194] There was nothing in the National Agreement that

prevented a former employee from reapplying after a rejection or inaction of a previous application. In fact, the application expired after six (6) months, which made it necessary to reapply if the applicant still wanted to be considered for employment. Numerous times after their layoffs, the Plaintiffs sought employment at various facilities of the Budd Company by mailing applications and/or contacting various personnel offices.

In July of 1982, the International Union, UAW and the Budd Company entered into a letter of understanding for the processing of applications under the preferential hiring clause of Document 12. [Appx. 11, pg. 124] The contents of this letter was never communicated to the Plaintiffs. Subsequently, on March 27, 1984, the Defendant Budd Company and the International Union, UAW entered into an

appeal procedure for those laid off employees who had sought employment under the preferential hiring clause and had been rejected. Again this procedure was never communicated to the Plaintiffs. The letter provided that the appeal must be made in writing by the UAW Budd Department to the Company's Manager of Labor Relations within thirty (30) calendar days after receipt of denial by the employee. Next, the company's Corporate Manager of Labor Relations, or his designee, will provide a written response to the appeal within fifteen (15) calendar days after receipt of such appeal. Such appeal shall be considered settled on the basis of the company's written response unless within thirty (30) calendar days the case is appealed to the permanent arbitrator appointed under the National Agreement. [Appx. 11, pg. 126-127] The Budd Company

and the International Union, UAW never processed an appeal and grievance as outlined in the letter of March 27, 1984 from William Kroger to James Ellis. [Appx., pg. 88]

In the latter part of 1983 and the early part of 1984, the Plaintiffs formed an organization called "The Committee of Former Budd Employees." [Appx. 24, pg. 218] The Committee sent letters to Mr. Owen Bieber, the President of the International Union, UAW, requesting assistance in their plight and requesting that the International Union, UAW grieve the Budd Company's refusal to hire them. [Appx. 25-55]

In February of 1985, all of the Plaintiffs wrote letters of application to each of the Budd Company facilities. [Appx. 8, pg. 85] The Budd Company did not have a practice or policy of sending

letters to all applicants who were rejected, advising them of their appeal rights. [Appx. 8, pg. 87], and did not advise Plaintiffs in this instance.

During the time that the Plaintiffs were seeking employment from the Defendant Budd Company at its various facilities, Defendant Buod Company was continuing to hire new employees. [Appx. 24, pg. 221]

Finally, in February of 1985, each of the Plaintiffs wrote letters of application to the Budd Company seeking employment. [Appx. 8, pg. 85], to which the company never responded. Subsequently, in April of 1985, the Plaintiffs wrote individual letters to the International Union, UAW requesting the filing of a grievance on the Budd Company's failure to hire them. No action was taken on these letters requesting that grievance action be taken.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the duties and responsibilities of labor organizations to represent their members. It presents for review Seventh Circuit's interpretation of Section 301 and the duty owed, which interpretation conflicts with that of numerous other circuits. The lack of uniformity among the circuits on this question results in more or less protection of one's statutory rights to be fairly represented by one's union depending on the fortuitousness of one's geographical location. Additionally, the opinion of the Seventh Circuit in this case unreasonably restricts the continuing violation theory in a manner inconsistent with applicable precedent.

A. THE SEVENTH CIRCUIT COURT OF APPEALS INCORRECTLY APPLIED PRECEDENT OF THIS COURT ESTABLISHED IN VACA VS. SIPES AND ISSUED AN OPINION WHICH CONFLICTED WITH OTHER CIRCUITS AS TO THE STANDARDS NECESSARY TO SHOW THAT THE UNION BREACHED ITS DUTY TO FAIRLY REPRESENT ITS MEMBERS.

In the Seventh Circuit, it is clear that the union has a duty to represent employees fairly, but they do not have a duty to be non-negligent in their representation of employees.

In 1967, this court set the standard for evaluating duty of fair representation claims involving grievance-handling in the case of Vaca vs. Sipes, 386 U.S. 171 (1967). In that case, the employer discharged a worker after the company's doctor judged that the worker's high blood pressure rendered him unfit for work. The union represented the worker through the preliminary steps of the grievance procedure. The union decided not to

arbitrate the grievance based on the fact that the employee had been sent to another doctor who supported the company's position. The employee filed a Section 301 lawsuit, claiming that he had a right to arbitrate the merits of his grievance. This court held that the employee' claim was of a breach of the duty of fair representation, but the evidence, which at most, showed that the determination of medical unfitness was incorrect, and which would not support a finding of bad faith or arbitrariness/fail to sustain the claim: The court further stated:

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith . . ."

This tripartite standard has been generally accepted as the definitive formulation of the fair representation

standard in the contract administration context. It is noted that this standard is disjunctive. The court went on to say: "That we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. (Id. at 190)

- Four years later in Amalgamated Association of Street Electrical Railway and Motor Coach Employees vs. Lockridge, 403, U.S. 274, 299-301 (1971). This court in dicta inferred that the Vaca standard required a showing of "fraud, deceitful action or dishonest conduct" on the part of the union.

Then some years later this court in Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554, 568-69 (1976), and Del Costello vs. International Bhd. of Teamsters, 462 U.S. 151, 164 (1983), indicated that a

union breaches the duty of fair representation when it handles a grievance in a "discriminatory, dishonest, arbitrary or - perfunctory fashion". This court completely ignored Lockridge, and the requirement of "fraud, deceitful action or dishonest conduct".

The Seventh Circuit in Hoffman vs. Lonzo, Inc., 658 F. 2d 519, (1981); Graf vs. Elgin, Joliet and Eastern Railway, Co., 697 F. 2d 771 (1983); Superczynski vs. P.T.O. Services, Inc., 706 F. 2d 200 (7th Cir. 1983); Camacho vs. Ritz/Carlton Water Tower, 786 F. 2d 242 (7th Cir. 1986), cert. denied, 106 Sup. Ct. 3282 (1986); Grant vs. Burlington Industries, 832 F. 2d 76 (7th Cir. 1987), specifically indicated "Courts may enforce duty of union to represent employees only when union conduct breaching that duty is intentional, invidious and

directed at the employee."

The Seventh Circuit in a classic example of union negligence in Graf, supra occurred with the following factual background: Mr. Graf was discharged for omitting a portion of his employment history on his job application. He filed a grievance, which was denied at the initial level. He then asked his union representative to appeal. The union representative agreed to proceed on the grievance, filled out the form and put it in his pocket. The appeals process elasped after a sixty (60) day expiration of time. The union man later found the grievance in his pocket. The Seventh Circuit held that the carelessness of the union representative did not give rise to a claim of the breach of the duty of fair representation: "Negligence, even gross

negligence . . . is not enough; and, obviously intentional misconduct may not be inferred from negligence, whether simple or gross . . ."

The Seventh Circuit's approach in Graf, supra, Hoffman, supra, Superczynski, supra, Camacho, supra, Grant, supra, and this case, conflicts with other circuits.

For example, in Dutrisac vs. Caterpillar Tractor Company, 749 F. 2d 1270 (9th Cir. 1983), the tractor company fired the employee for allegedly excessive absenteeism. The employee claimed that the discharge was racially motivated and filed a grievance. The union decided to take the case to arbitration, but the union representative made a mistake in calculating a date on which the formal request for arbitration was due. The arbitrator dismissed the grievance as

untimely. The employee then sued the union claiming that the mis-handling of the grievance breached a duty of fair representation. The Court of Appeals for the Ninth Circuit upheld the claim, even though it specifically acknowledged that there was not evidence of intentional misconduct.

Similiarly, in the Sixth Circuit, Ruzicka vs. General Motors Corp., 523 F. 2d 306 (6th Cir. 1975), the employer fired the plaintiff for being intoxicated on the job and for verbally abusing his supervisor. The employee then filed a grievance claiming that the penalty was unduly harsh. The union then filed the notice required for arbitration. However, it was necessary for the union to file a detailed statement of the grievance by the terms of the collective bargaining agreement. The union had failed to file such a statement

and the grievance expired. The employee sued the union for violation of the duty of fair representation. The District Court dismissed the suit, holding that mere neglect, rather than intentional hostile inaction was insufficient to establish a duty of fair representation claim. The Court of Appeals for the Sixth Circuit reversed holding that the unions "negligent and perfunctory handling" of the employees grievance constituted unfair representation.

In following the dictates of the U.S. SUpreme Court, other circuits have followed the tripartite standard as set forth in Vaca, supra, and concluded that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. (See DeArroyo v. Sindicato de Trabajadores Packing House, 425 F.2d 281-284 (1st Cir. 1970); C.F. Medlin v. Boeing Vertal Co., 620 F.2d 957-962 (3rd

Cir. 1980); Griffin v. U.A.W., 469 F.2d 181-183 (4th Cir. 1972); Farmer v. ARA Services, Inc., 660 F.2d 1096-1103 (6th Cir. 1981); Ethier v. U.S. Postal Services, 590 F.2d 733-736 (8th Cir. 1979).

The Seventh Circuit in this case also indicated that while Plaintiffs are correct in noting that perfunctory handling of agreements may be sufficient to establish liability in other circuits . . . this circuit has determined that until the Supreme Court resolves these recurring differences. . . Hoffman, stanos. Because of the Seventh Circuit's incorrect application of the precedent in Vaca, supra, and the conflict among the circuits, the Plaintiffs herein invite this court to clarify the issue of what standard is required to show that the union breached its duty to fairly represent its members.

B. PLAINTIFFS' JUNE 1985 COMPLAINT WAS TIMELY AS TO THE UNION'S REFUSAL TO GRIEVE BUDD'S DENIALS OF EMPLOYMENT THROUGH 1984 UNDER THE CONTINUING VIOLATION THEORY

In its opinion dated May 5, 1988, Circuit Court relied on its earlier ruling in Metz v. Tootsie Roll Industries, Inc., 715 F. 2d 299, 305-306 (7th Cir. 1983), for its determination that Plaintiffs' pre-1985 claims were time-barred. (See, Budd, Slip Op., Petitioners' Appx. B. pgs 6,7).

We do not take issue with the holding in Metz, supra. However, we believe that Metz is not applicable to the case at bar. In Metz, the Plaintiff filed one (1) grievance regarding his one (1) discharge. By its nature a discharge, unless the Plaintiff is rehired, is not capable of repetition. Here, Budd's violation was capable of repetition, and indeed was repeated. In other words, the Plaintiffs applied for preferential hiring not once,

but hundreds of times, including 186 times in 1985. (See, Petitioners' Appx., pp. 1-5, which is reproduced from Appellants' Brief Exh. 4, pp. 21-23). The Budd Co., rejected, by inaction Plaintiffs' applications, not once, but hundreds of times. The Plaintiffs made requests to the UAW for grievances regarding hundreds of these separate rejections (See, Petnr.'s Appx. E, pp. 1-5) The UAW, by its inaction, failed to pursue any of these requested grievances, except in one (1) instance for one (1) of the Plaintiffs, L.M. Jackson's application to 1 of 6 surviving Budd Co. plants.

This is not a case in which ". . . no other events are alleged to have occurred within the six-months prior to this action . . ." Metz, supra, at 306. Indeed, Plaintiffs' 1985 grievances attempts, and UAW inaction on them, were fresh violations

separate and distinct from the pre-1985 violations - occurring within six months of the filing of this action. (See, Budd, Slip Op. Petitioners' Appx. B at p. 4).

The only relevant question in the continuing violation context is whether the timely 1985 violations were part of a continuing chain of violations, same of which having occurred more than six (6) months prior to the filing of the action.

If the timely violations were part of the continuing chain of previous violations, then the previous violations are also actionable under the continuing violation theory. (See, Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976); Lewis v. Local Union 100, 750 F. 2d 1368, (7th Cir. 1984); Berry v. E.I. Du Pont de Nemours, 625 F. Supp. 1364, (D. Del. 1985).

In page 7 of its slip opinion, this Court indicates:

> Moreover, even assuming that the union's refusal to process plaintiffs' grievances amounted to a continuing violation of its duty to represent the plaintiffs, only complaints based upon conduct occurring within the six-month period preceding the filing of this complaint are timely. See Ray Lewis v. Local Union 100, 750 F. 2d 1368, (7th cir. 1984).

However, we believe that this proposition is at odds with the opinion in Lewis, supra.

In Lewis, the plaintiff filed his Section 301 Complaint on March 23, 1982, alleging repeated violations. Although occurring more than six months prior to the filing of the action, some violations would be considered the earlier violations timely because they were part of ". . . an ongoing course of conduct by the Union "since February, 1980" of repeatedly

refusing to refer Lewis out for employment".

Lewis, supra, at p. 1378.

Additionally, the Lewis Court stated:

> We are aware that the conclusion we reach may seem at odds with the policies of the six-month limitation period. In Del-Costello, the Court stated that the six-month period was appropriate because it provided for the rapid resolution of labor disputes and at the same time, afforded plaintiffs ample time in which to vindicate their rights. 462 U.S. at 169-70, 103 S. Ct. at 2293. Here, Lewis waited almost two years after he was aware that the Union was allegedly discriminating against him to file a lawsuit. Nonetheless, we have decided that Lewis' failure to bring suit against the Union for discriminatory acts in 1980 would not bar him from bringing suit for identical discriminatory acts occurring within the six months prior to March, 1982."

Id. at p. 1379. This explanation of variance from the policies of the six-month limitation period would not have been

necessary if Lewis had held, as this Panel's Slip Opinion indicates.

Further, it should be noted that the continuing violation theory tolls the six-month limitations period, even where the plaintiff knew or should have known, more than six-months prior to the filing of the Complaint, ". . . that the Union intended to take no further action with their grievance request." (See, Budd, Slip Op., Petitioners' Appx B. p. 6). In the Lewis case, the plaintiff filed an unfair labor practice charge with the NLRB in August, 1980, for more than six-months prior to his March 1982 Complaint, and the Lewis Court determined:

> "Thus, Lewis was aware at least by August 26, 1980, that the Union was discriminating against him in job referrals."

Lewis, supra, at p. 1379, F.N. 16.

Nonetheless, because the alleged February 1980 violation was part of the continuing chain of alleged violations, the Lewis Court held the February 1980 violation timely on the basis of a March 1982 Complaint.

Thus, it is Lewis, supra, and not Metz, supra, that is the controlling decision as applied to the instant case. The doctrine of stare decisis requires that like facts receive like treatment in a court of law. Flowers vs. U.S., 764 F. 2d 759 (11th Cir. 1985).

With regard to the importance of stare decisis, the Supreme Court has stated:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and

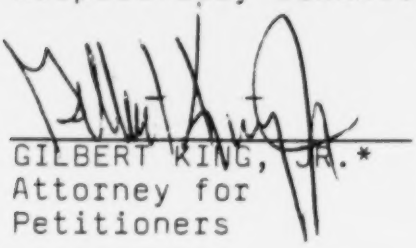
> expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."
> Moragne v. States Marine Lines, 398 U.S. 375, 403, 90 S. Ct. 1772, 1789, 26 L.Ed. 2d 339, 358 (1970).

Thus, this Court should hold that the pre-1985 violations are not timed-barred if they are, although separate incidents, part of a continuing chain of violation by UAW and Budd, the last of which occurred within six-months of the filing of this action.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be granted and Judgment and Order of the Court of Appeals should be reversed.

Respectfully submitted,



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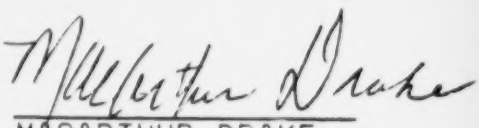

MACARTHUR DRAKE
Attorney for
Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 6, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. HUBERT L. WILL, Senior District Judge*

HENRY C. ADAMS, Jr., et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern
NO. 87-1771 vs.	)	District of Indiana,
THE BUDD COMPANY, et al., Defendants-Appellees.	)	Hammond Division
	)	No. 185-556 James T. Moody, Judge

A M E N D E D O R D E R

On consideration of the petition for rehearing filed by counsel for Plaintiffs-Appellants Henry C. Adams, Jr.,

et al., in the above-entitled cause, all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Hubert L. Will, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 5, 1988.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. HUBERT L. WILL, Senior District Judge

HENRY C. ADAMS, Jr., et al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 85 C 556 Judge James T. Moody
NO. 87-1771 vs.	
THE BUDD COMPANY, (H.Q.) Ticular Head of all Nationwide Budd Company Facilities and THE INTERNATIONAL UNION, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Defendants-Appellees.	

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1771

HENRY C. ADAMS, JR., et al.,

Plaintiffs-Appellants,

v.

THE BUDD COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. H85-556—**James T. Moody**, *Judge.*

ARGUED DECEMBER 3, 1987—DECIDED MAY 5, 1988

Before BAUER, *Chief Judge*, RIPPLE, *Circuit Judge*, and WILL, *Senior District Judge.**

WILL, *Senior District Judge.* Plaintiffs, 31 former employees of the Budd Company's Indiana plant ("Budd"), filed this action alleging that Budd violated their preferential hiring rights under a collective bargaining agreement by refusing to hire them at other Budd facilities after they were laid off. Plaintiffs also sued their collective bargaining agent, Local 1122 of the United Automobile, Aerospace & Agricultural Implement Workers of America ("the

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, sitting by designation.

union"), alleging that the union breached its duty of fair representation by refusing to arbitrate their charge that Budd violated the collective bargaining agreement. The district court granted summary judgment in favor of both defendants. We affirm.

I.

The undisputed facts on appeal reveal the following. The Budd Company is a manufacturer of automobile and truck body parts. It has two plants in Philadelphia and other plants in Tennessee, Michigan, and Ohio. Until November 1982, Budd also operated a plant in Gary, Indiana, which closed due to business conditions. The plaintiffs in this action were all employed by Budd's Gary facility. All were laid off between 1979 and 1980; they had not been recalled when Budd shut the Gary plant down. The following agreements set the terms and conditions of future employment for laid off workers in the Gary plant: a National Production and Maintenance Agreement; a local supplemental agreement; a letter agreement on preferential hiring; and a plant closedown agreement negotiated in October 1982.

These four agreements did not provide the laid-off workers much security. For example, the preferential hiring agreement required only that Budd (1) post job openings for plants covered by the National Agreement, (2) make available applications to seniority employees of the Gary plant on indefinite layoff at its Indiana personnel office, and (3) allow seniority employees to apply through the mail rather than having to apply in person at each Budd facility.

Each application by a laid-off worker under the provisions of the preferential hiring agreement was valid for only six months. After six months, the employee was required to send in a new application if he wished to be considered for employment at other Budd plants. Moreover, under the national and local agreements, preferential hire rights were limited to "seniority employees." Employees could retain seniority status for a maximum of five years after the date of layoff, or for a period equal

to total seniority, whichever was less. Finally, laid-off senior Gary employees were not given absolute preferential hiring rights; the July 27, 1982 letter agreement provided instead that laid-off employees were entitled to consideration for employment at other plants but that Budd reserved sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards.

Budd closed its Gary plant in November 1982. Between 1982 and 1984, laid-off Gary employees submitted approximately 550 applications for openings at surviving Budd plants. One hundred and sixty of these employees eventually got jobs at other Budd plants; none of the plaintiffs ever received offers of employment.

In February 1984, a group of laid-off employees formed "The Committee of Former Budd Employees" ("the Committee"). All of the plaintiffs were members. The Committee sent a letter on March 7, 1984 to Dallas Sell, a director of the union, asking for assistance with their problems involving the recall and relocation practices of Budd's Philadelphia plant. On March 9, 1984, Owen Beiber, the President of the union, wrote back stating that he was referring the Committee's correspondence to the union's "Budd Company Department" for "investigation and follow-through."

Thomas Rodgers, the International Representative of the union's Budd Company Department, investigated the Committee's complaints. Rodgers obtained from Budd the personnel records of 24 Committee members denied employment. On April 10, 1984, Rodgers wrote the Committee that he had investigated Budd's refusal to hire them and that he was enclosing employment records which contained information on why Budd had denied them jobs at other plants. Rodgers stated: "It is for the reason shown that the Company refuses to hire you at the Philadelphia plant. If you have any further questions, do not hesitate to write to me."

Approximately one year later (and following two successive National Labor Relations Board dismissals of unfair labor practice charges filed by the Committee against the union), plaintiffs again submitted applications to Budd for jobs at other plants. By this time, however, fifteen of the former employees had lost their seniority rights (including the right to assert breach of the collective bargaining agreement) because five years had passed since Budd had laid them off. Moreover, because Budd had closed the Gary area personnel office the previous summer, Budd was no longer accepting mailed applications for preferential hire. When Budd denied the plaintiffs' February 1985 applications, the plaintiffs again asked the union to file grievances. Rodgers, however, refused this request because, he alleged, plaintiffs' applications were both untimely and without support in the contract.

Plaintiffs subsequently filed this action against Budd and the union alleging that the union breached its duty of fair representation, and that Budd's failure to rehire them at other plants constituted a breach of the collective bargaining agreement. At the close of discovery, both the union and Budd successfully moved for summary judgment. In granting the defendants' motions for summary judgment, the district court first found that the statute of limitations had run on plaintiffs' claims involving the union's failure to grieve or arbitrate Budd's refusals to hire them at other plants from 1979 through 1984. Second, the court found that although plaintiffs' June 1985 complaint was timely with regard to the union's failure to grieve Budd's February 1985 denials of preferential hire, defendants were entitled to summary judgment as to fifteen of the plaintiffs because they had lost seniority status prior to the filing of the 1985 applications. Finally, the court concluded that the remaining plaintiffs could not pursue their breach of contract claim against Budd because they were unable to establish a necessary element of that cause of action: that is, breach of the union's duty of fair representation.

II.

At issue is whether the court correctly granted defendants' motions for summary judgment. In a somewhat rambling fashion, plaintiffs raise various arguments on appeal. Many of the specific contentions advanced by the plaintiffs were not raised before the district court and hence were waived. *Hunter v. Allis-Chalmers Corporation*, 797 F.2d 1417, 1430 (7th Cir. 1986); *Evans v. Fluor Distributor Cos.*, 799 F.2d 364, 366 (7th Cir. 1986). Here, we need only review two issues: (1) whether there are material facts in dispute which could establish a breach of the union's duty of fair representation, which breach is a condition precedent to the plaintiffs' suit against Budd for violation of the collective bargaining agreement, and (2) whether plaintiffs' June 1985 complaint was timely as to the union's refusal to grieve Budd's denials of employment through 1984.

We first examine whether plaintiffs' claims surrounding the union's failure to grieve Budd's alleged violations of the collective bargaining agreement from 1979 through 1984 are time barred.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), establishes a federal forum to resolve suits for violation of contracts between an employer and a labor organization. The LMRA contains no statute of limitations for § 301 actions. Yet the Supreme Court has held that the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to "hybrid § 301/duty of fair representation" claims like the present case. *DelCostello v. Teamsters*, 462 U.S. 151, 154 (1983). The six-month limitations period begins to run "from the time a final decision on the employee's grievance has been made or from the time the employee discovers, or in the exercise of reasonable diligence should have discovered, that no further action would be taken on his grievance." *Richards v. Local 134*, 790 F.2d 633, 636-37 (7th Cir. 1986); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir.

1983) (union's refusal to file grievance constitutes a final decision that triggers the running of the statute of limitations).

Here, though plaintiffs continually applied and were continually refused employment by Budd from 1979 through 1984, plaintiffs did not file their complaint in the district court until June 17, 1985. Plaintiffs contend that this filing was timely because the union never told them that it had completed its inquiry into plaintiffs' claims that Budd had violated the preferential hiring agreement. Yet, it is clear that plaintiffs knew or should have known as early as April 10, 1984—the date of Thomas Rodgers' letter stating that he had investigated plaintiffs' complaints—that the union intended to take no further action on their grievance request. Following receipt of this letter, plaintiffs were required to file their complaint regarding Budd's denial of their 1979-1984 applications no later than October 10, 1984.

Any remaining question concerning the plaintiffs' knowledge of the union's intention is dispelled by the fact that the Committee filed an unfair labor practice charge with the NLRB against the union on May 3, 1984, alleging a breach of the duty of fair representation. Plaintiffs' own actions thus establish that they, too, interpreted Rodgers' letter as a final decision by the union not to pursue their claims. *See Gustafson v. Cornelius Co.*, 724 F.2d 75, 77 (8th Cir. 1983) (court may rely on an unfair labor practice charge filed over the same conduct that later gives rise to a § 301 complaint as evidence that the plaintiff knew the union would pursue his grievance no further).

Alternatively, plaintiffs argue that even if they had known as of April 10, 1984, that the union would be taking no further action, the six-month statute of limitations should be "tolled" because the union's repeated refusal to process their grievances amounted to a "continuing violation" of its duty of fair representation.

Plaintiffs reliance on a continuing violation theory to revive their time-barred claims is misplaced. As the cases

in this circuit make clear, continued union inactivity after an initial failure to respond to a grievance request does not constitute a continuing violation of the duty of fair representation. *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 305-306 (7th Cir. 1983). For example, in *Metz*, the union notified plaintiff on May 5, 1981, that her discharge was in violation of the collective bargaining agreement. In the months that followed, plaintiff repeatedly requested the union to act on her grievance, yet the union failed to respond. Subsequently, the plaintiff filed a hybrid § 301/breach of duty of fair representation in the district court. The district court dismissed the action as untimely and we affirmed. Specfically, we stated that

> if this court were to permit the cloaking of [the union's] inactivity with illegality by invoking events which occurred more than six months prior to the bringing of this action, it would be in effect reviving a legal non-cognizable unfair labor practice.

Id. at 306.

Moreover, even assuming that the union's refusal to process plaintiffs' grievances amounted to a continuing violation of its duty to represent the plaintiffs, only complaints based upon conduct occurring within the six-month period preceding the filing of this complaint are timely. *See Ray Lewis v. Local Union 100*, 750 F.2d 1368, 1369 (7th Cir. 1984). Thus, the continuing violation theory could not support plaintiffs' assertion that the June 1985 complaint is timely as to any claims arising from Budd's refusal to hire them from 1979-1984 and the union's subsequent refusal to grieve these rejections. For this reason, the district court correctly dismissed as untimely, all claims except those based upon Budd's refusal to hire plaintiffs following receipt of their February 1985 employment applications.

We next address whether the union breached its duty by failing to grieve plaintiffs' claims involving Budd's alleged 1985 violations of the collective bargaining agreement. Generally, employees must attempt to exhaust any

intra-union appeals before they can maintain a suit against their employer under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981).[1] Once the union makes a final decision on the employee's claim that the employer breached the collective bargaining agreement, the employee may not relitigate the merits of his grievance in a § 301 action against his employer unless he can show that the grievance process was somehow subverted. *Vaca v. Sipes*, 386 U.S. 171 (1967). This usually involves showing that the union breached its duty of fair representation. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976) ("To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must

[1] In addition to defending the grant of summary judgment on the ground that there are no facts in dispute that could establish a breach of the union's duty of fair representation, Budd also argues that summary judgment was appropriate because the plaintiffs failed to exhaust internal union appeal procedures and that exhaustion is a precondition to bringing a § 301/fair representation suit. Although plaintiffs represented at oral argument that they had in fact exhausted intra-union remedies, we have found nothing in the record to support this representation. Nevertheless, we decline Budd's invitation to affirm on this ground; for even if plaintiffs failed to exhaust the union's appeals procedure before bringing this suit, this would not necessarily bar plaintiffs' § 301 action as a matter of law.

Where a plaintiff can show one of the following situations, exhaustion of intra-union appeals is not required: (1) that union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; (2) that the internal union procedures are inadequate to either reactivate the grievance or to award him the full relief he seeks under § 301; and (3) that exhaustion of internal appeals would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits. *Clayton v. International Union, UAW*, 451 U.S. 679, 689 (1981); *see also Bassett v. Local Union No. 705*, 773 F.2d 932, 935 (7th Cir. 1985). Here, in granting summary judgment, the district court did not address the exhaustion requirement and therefore made no findings whether any of these conditions were present in this case.

also carry the burden of demonstrating breach of duty by the Union."). Thus, before plaintiffs can pursue their § 301 claim against Budd, they must meet the burden of showing that the union breached its duty fairly to represent laid-off employees. If plaintiffs are unable to prove such a breach, their § 301 claim is barred. *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221, 1223 (7th Cir. 1985).

In this circuit "mere negligence" or even "gross negligence" on the part of a union is insufficient to support an action for breach of the duty of fair representation; plaintiffs must show instead that a union engaged in "intentional misconduct." *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522 (7th Cir. 1981); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 243 (7th Cir. 1986). Thus, a "union may be liable if it discriminates against the employees for forbidden reasons (such as race or politics, including the employee's position on the union and its leaders). It is not liable, however, for careless or boneheaded conduct." *Id.* at 244.

Notwithstanding that this circuit has repeatedly "declined all invitations" to overrule the intentional misconduct standard of *Hoffman*, (*see e.g.*, *Camacho*, 786 F.2d at 244; *Grant v. Burlington Industries*, 832 F.2d 76, 79-80 (7th Cir. 1987); *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200 (7th Cir. 1983)), plaintiffs renew the invitation. They argue: (1) that the district court erred in not applying the less stringent standard governing breach of fair representation cases contained in *Baldini v. Local Union No. 1095, UAW*, 581 F.2d 145 (7th Cir. 1978); and (2) that the district court erred when it declined to infer intentional misconduct from evidence that the union repeatedly showed a lack of vigor in investigating plaintiffs' complaints.

The district court rejected both these arguments, and we reject them here. To begin with, plaintiffs' reliance on *Baldini* is misplaced. The *Baldini* test (i.e., that a union subjects itself to liability for unfair representation

when it arbitrarily or perfunctorily handles a grievance) has been superceded by the *Hoffman* intentional misconduct rule. Although plaintiffs are correct in noting that perfunctory handling of a grievance may be sufficient to establish liability in other circuits (*see e.g., Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 1091 (9th Cir. 1978); *Wyatt v. Interstate & Ocean Transportation*, 623 F.2d 888, 891 (4th Cir. 1980); *Curtis v. United Transportation Union*, 700 F.2d 457 (8th Cir. 1983)), this circuit has determined that until the Supreme Court "resolve[s] these recurring differences . . . *Hoffman* stands." *Camacho*, 786 F.2d at 246.

To support their claim that summary judgment was improper even under the more stringent *Hoffman* standard, plaintiffs contend that there is "ample evidence . . . in the record as a whole from which the fact-finder or jury could determine that [the union] deliberately and unjustifiably failed to represent plaintiffs." Plaintiffs then assert that intentional misconduct should be inferred from evidence of the union's "repeated and deliberate" refusal to file a grievance.

Taken in its best light, however, the evidence here can only support a claim of inferior representation, and as we have noted, *Hoffman* precludes our reviewing the quality or adequacy of representation. The record shows: (1) that Rodgers relied on Budd's representation that plaintiffs were unemployable because they had allegedly not met "local" hiring standards without any independent investigation; (2) that Rodgers refused to pursue plaintiffs' 1984 grievance request because he believed the union had no sound basis for submitting grievances in view of the restrictive language in the preferential hire agreement that gave Budd sole discretion to establish "local plant hiring eligibility requirements" and to reject employees on the basis of these local standards; and (3) that Rodgers sat on plaintiffs' 1985 grievance request because he had investigated plaintiffs' identical claims of contractual violations a year earlier and found that, given the language of the preferential hire agreement, they were without support.

Thus, Rodgers' actions, perfunctory though they may have been, do not come close to the level of intentional misconduct envisioned by the *Hoffman* decision. Indeed, nothing in the record can support the conclusion that the union acted in a "deliberate and severely hostile irrational manner, or that it engaged in "fraud, deceitful action or dishonest conduct." *Hoffman*, 658 F.2d at 522. In fact, plaintiffs uniformly admitted at their depositions that they possessed no evidence of any hostility by the union toward any plaintiff.[2]

To sum up, plaintiffs failed to present any evidence of intentional misconduct by the union. Because the showing of a breach of the union's duty of fair representation is a necessary condition to establishing plaintiffs' case against Budd, plaintiffs' claims against both defendants must fail. Accordingly, the decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] Nor do the plaintiffs claim that Rodgers failed altogether to represent their claims. This would be a different case in the event of such a claim because this circuit has stated that it will review an arbitral action that instead of interpreting a contract, is tantamount to revising it. *See Camacho, supra*, 786 F.2d at 244 ("The grievance and arbitration machinery is designed to place review . . . in specialized tribunals. Review of arbitral awards is close to nonexistent so long as the arbitrator interprets (as opposed to revises the contract)."). Where a contract guarantees representation, an egregious and flat out refusal to represent has the effect of cancelling the contractual guarantee. *Hoffman* does not (and could not consistent with congressional policy) bar review of an egregious failure to represent contractual rights. Such a failure is neither alleged here nor disclosed by the record.

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APPENDIX C

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al., Plaintiffs,	)	
v.	)	Civil No. H85-556
THE BUDD COMPANY, et al. Defendants.	)	

O R D E R

This matter comes before the court on a Motion to Amend and or Alter Judgment of February 11, 1987 which the plaintiffs filed on February 24, 1987. The Budd Company and the Union defendants filed responses in opposition on March 17, 1987 and April 3, 1987, respectively, to which the plaintiffs have not replied. For reasons discussed below, the Motion to Amend and or Alter Judgment is DENIED.

The plaintiffs filed this action on June 17, 1985 alleging that their former employer, The Budd Company, terminated their employment and refused to rehire them and thus breached the collective bargaining agreement between The Budd Company and the Union. The complaint also alleges that the Union breached its duty of fair representation by failing to grieve or arbitrate their charge that The Budd Company had violated the collective bargaining agreement. The Court granted the defendants' Motion for Summary Judgment on February 9, 1987. The court will consider the plaintiffs' claims of error in seriatim.

II.

The plaintiffs first contend that the court erred in concluding that the collective bargaining agreement provides that an employee loses his preferential hiring rights after five years of continuous lay-off or after a period equal to his total seniority whichever is lesser. As the court explained in its order granting summary judgment, the preferential hiring provisions of the collective bargaining agreement were expressly limited to "seniority employees" and the collective bargaining agreement provided that employees' seniority rights expire after five years of continuous lay-off or after a period equal to his total seniority, whichever is lesser.

In opposing summary judgment, the plaintiffs filed no evidentiary materials to show the existence of a genuine issue on the question of whether particular plaintiffs' seniority rights and, consequently, hiring rights had expired. When a summary juogment motion is made and supported as provided in Fed.R.Civ.P. Rule 56(c), Rule 56(c) requires "the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, ___U.S. ___, 106 S.Ct. 2505, 91 L.Ed.2d 265, 274 (1986). Factual assertions included only in the plaintiffs' brief are insufficient to dispute a fact proven by affidavit or by authenticated copies of the preferential hiring agreement and collective bargaining

agreement. Because the collective bargaining agreement's preferential hiring provisions presented no ambiguity as to the duration of preferential hiring rights and the plaintiffs presented no Rule 56 materials to demonstrate such an ambiguity, the court properly decided that issue as a matter of law.

III.

The plaintiffs next contend that the court erred in resolving an ambiguity in the preferential hiring agreement as to the conditions the preferential hirin agreement imposed for the exercise of preferential hiring rights. Although the language is somewhat befuddled, the plaintiffs seem to be asserting that the preferential hiring agreement was ambiguous as to whether persons who were seniority employees at the

time of their lay-off could exercise preferential hiring rights after they had subsequently lost their status as seniority employees. The court found the language of the preferential hiring agreement to be unambiguous and that neither the Rule 56 submissions nor the the plaintiff's present motion demonstrates otherwise.

IV.

The plaintiffs next raise, for the first time, the argument that the court's construction of the collective bargaining agreement renders the agreement violative of the Labor Management Relations Act. As a consequence, the argument continues, the court ignored the rule of statutory construction which imposes a duty to give

contractual provisions a lawful construction, if possible without violence to the plain language. Without deciding whether the court's construction of the collective bargaining agreement would render the agreement unlawful, the court finds that any other construction would be contrary to the clear meaning of the agreement. Thus, the court contravened no rule of statutory construction in interpreting the collective bargaining agreement.

V.

The plaintiffs' contentions that the court erred, on various grounds, in determining as a matter of law that the complaint was untimely filed as to numerous plaintiffs are facially without merit. The issues raised in this regard were

adequately and thoroughly addressed in the court's order granting summary judgment.

VI.

The plaintiffs also contend that the court erred in finding that the plaintiffs whose claims are not time-barred had failed to present any evidence of intentional misconduct by the union. The plaintiffs assert that the record as a whole includes evidence from which one could infer that the union deliberately refused to file their grievances. As the court stated in its previous order, an employee bears the substantial burden of pleading and proving that the union deliberately and unjustifiably refused to represent him. In the face of documentary evidence showing an absence of any deliberate misconduct of the union, the plaintiffs presented no

evidence to suggest the contrary. Thus, the plaintiffs failed to make a showing sufficient to establish the existence of intentional misconduct, an element essential to the plaintiffs' case and on which the plaintiffs would bear the burden of proof at trial. Consequently, summary judgment was appropriate on that issue. Celotex, 106 S.Ct. 2548 (1986).

VII.

The plaintiffs also assert that the court erred in striking their cross-motion for summary judgment which was filed 48 days after the date the court had set as the deadline for the filing of pre-trial motions. The plaintiffs cite Fed.R.Civ.P. 56(a) for the porposition that a party may move for summary judgment "at any time. . . after service of a motion for summary

judgment by the adverse party." The time for filing summary judgment motions is subject to the further rule that "the judge. . .shall. . .enter a scheduling order that limits the time. . .to file and hear motions." Fed.R.Civ.P 16(b). On October 29, 1985, the court entered such an order specifying that the final day for the filing of pre-trial motions was October 31, 1986. The plaintiffs' failure to heed this deadline is grounds for the court to disregard their untimely motion.

VIII.

Finally, the plaintiffs assert that the court erred in dismissing the claims of ten plaintiffs on August 15, 1986, for failure to espond to interrogatories and that the court erred in granting the defendants' Motion for Protective Order against the

taking of Owen Beiber's deposition. Because these contentions were duly addressed in previous orders, the court declines to retrace those discussions in the present order.

CONCLUSION

For the reasons discussed above, the plaintiffs' Motion to Amend and or Alter Judgment of February 11, 1987 is hereby DENIED.

ENTER: April 14, 1987

/s/
JAMES T. MOODY, JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al.,	)	
	)	JUDGMENT IN A
	)	CIVIL CASE
v.	)	
	)	
THE BUDD COMPANY, et al.	)	CASE NO. H85-556

Jury Verdict: This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that because The Budd Company and the Union defendants have shown that there exists no genuine issue as to any material fact and that they are

entitled to judgment as a matter of law, the defendants' Motions for Summary Judgment are hereby GRANTED. The Clerk of the Court is DIRECTED to enter judgment accordingly. The plaintiffs' Cross-Motion for Summary Judgment is ORDERED STRICKEN from the record.

DATED: February 11, 1987
Clerk: RICHARD E. TIMMONS

/s/_____
SUZANNE D. ALCOLA
Deputy Clerk

UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

HENRY ADAMS, et al., Plaintiffs,	)	
v.	)	Civil No. H85-556
THE BUDD COMPANY, et al. Defendants.	)	

ORDER

This matter comes before the court on Motion for Summary Judgment filed by defendant The Budd Company and defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 1122 (the Union) on October 31, 1986. The plaintiffs filed a motion and memorandum in opposition and a Cross-Motion for Summary Judgment on December 19, 1986 to which The Budd Company replied on January 15, 1987 and the Union defendants replied on January 16, 1987. For reasons discussed below, the defendants' Motions for Summary Judgment

are GRANTED and the plaintiffs' Cross-Motion for Summary Judgment is STRICKEN inasmuch as it fails to meet the time requirements for filing such motions as set forth in this court's scheduling order dated October 29, 1985.

I.

The plaintiffs filed this action on June 17, 1985 alleging that their former employer, The Budd Company, terminated their employment and refused to rehire them and thus breached the collective bargaining agreement between The Budd Company and the Union. The complaint also alleges that the Union breached its duty of fair representation by failing to grieve or arbitrate their charge that The Budd Company had violated the collective bargaining agreement.

The defendants request summary judgment on the grounds that the plaintiffs' claims are untimely filed, the plaintiffs have failed toexhaust available internal union remedies, the plaintiffs have presented no evidence of intentional union misconduct, and many of the plaintiffs are unable to show a breach of the collective bargaining agreement.

The plaintiffs are former employees of The Budd Company who were laid off between 1979 and 1980 and were never recalled by The Budd Company. They claim that The Budd Company violated the preferential hiring provisions of the collective bargaining agreement by refusing to hire them at other Budd Company facilities after they were laid off from the Gary facility. They claim the Union breached its duty of fair representation by refusing to pursue grievances to protest The Budd Company's

refusal to heed the preferential hiring provisions.

II.

Timeliness of Complaint

Section 301 of the Labor Management Relations Act (LMRA) establishes a federal forum to resolve suits for violation of contracts between an employer and a labor organization. 29 U.S.C. Sec. 185(a). The LMRA containes no statute of limitatins for Sec. 301 actions. The Supreme Court has decided, however, that the six-month statute of limitations contained in Sec. 10(b) of the National Labor Relations Act applies to hybrid Sec. 301/duty of fair representation cases. Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 154 (1983). The cause of action

accrues and the statute of limitations begins to run when the "final decision on the plaintiff's grievance has been made or from the time the plaintiff discovers or in the exercise of reasonable diligence should have discovered, that no further action would be taken on his grievance." Richards v. Local 134, 790 F.2d 633, 636-37 (7th Cir. 1986); Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983).

In the case at bar, the plaintiffs filed their complaint on June 17, 1985. Thus, the statute of limitations question turns on whether the plaintiffs knew or should have known by December 17, 1984 that the Union would take no further action on their grievance. The most recent lay-off among the plaintiffs was on December 12, 1981. After their lay-offs the plaintiffs

filed, at various times, applications for employment at other Budd Company facilities and were rejected. In or before February of 1984, a group of laid-off Budd Company employees formed an organization called "The Committee of Former Budd Company Employees." By the summer of 1984, all of the plaintiffs in the present case were members of this Committee.[1] The Committee sent a letter on March 7, 1984 to Dallas Sell, Director of Region 3 of the UAW, asking Sell to assist them in solving their dilemma about the transfer and relocation practices of The Budd Company plant in Philadelphia, Pennsylvania. On March 9, 1984, Owen Beiber, the President of the UAW, sent the Committee a letter stating that he was referring the Committee's correspondence regarding The Budd Company's relocation practices to the UAW Budd Company Department "for

investigation and follow-through."

On April 10, 1984, Thomas Roogers, the International Representative of the UAW Budd Company Department sent a letter to the Committee informing them that he had investigateo the Buoo Company's refusal to hire them ano enclosing the employees' personnel recoros on which The Budd Company's hiring decisions were based. Rodgers wrote, "It is for the reason shown that the Company refuses to hire you at the Philadelphia plant. If you have any further questions, do not hesitate to write to me." When the Committee received this letter in April of 1984, its members knew or should have known that the Union deemed this the eno of its inquiry into The Budd Company's refusal to rehire them. By Rodgers' letter, it was clear that the Union intendeo to take no further action on their behalf with regard to the employment

applications they had previously made to The Budd Company.

Indeed, the Committee must have known that the Union intended to take no further action because the Committee filed an unfair labor practice charge on May 3, 1984, against the Union alleging that the Union breached its duty of fair representation by failing to pursue the displaced employees' preferential hiring rights at The Budd Company's Philadelphia plant. It was readily apparent that the Union had taken the position that the plaintiffs' applications had been justifiably refused and that the Union did not intend to submit grievances to charge violations of the preferential hiring provisions with regard to these former employees. If they were not actually aware that the Union would have alerted them that

the Union intended to take no further action.

The statute of limitations on the charges stemming from the plaintiffs' applications for employment between 1979 and spring of 1984 began to run or April 10, 1984 when Thomas Rodgers effectively notified them that he had completed his inquiry into their questions about preferential hiring rights. Thus, the plaintiffs were required to file suit on this grievance on or before October 10, 1984. Because they did not file this suit until June 17, 1985, their claims based on The Budd Compaby's refusal to hire them diring the perioo from 1979 through spring of 1984 are barreo by the six-month limitation period. Del Costello, 462 U.S. at 154. Contrary to the plaintiffs' assertion, the filing of an unfair labor practices charge with the NLRB does not

toll the running of the limitations period in hybrid claims against the employer and a union. Adkins v. International Union of Electrical,- Radio & Machine Workers, 769 F.2d 330, 335 (6thCir. 1985); Katsaros v. Transit-Mix Concrete Corp., 615 F.Supp 450 (S.D.N.Y. 1985).

The plaintiffs filed additional employment applications to six of the Budd Company plants on February 22, 1985, and then sent letters of grievances on April 6, 1985, when The Budd Company failed torespond to their applications. The grievance specified that the Union's failure to respond to the grievances in 10 days would be deemed a rejection of their grievances. The grievance letter dated April 6, 1985 complained only of The Budd Company's denial of the plaintiffs' February 22, 1985, applications. The court

must give the plaintiffs the benefit of the inference that they did not know until April 23, 1985 that the union would not pursue their grievances. Because the complaint in this case was filed within six months after the April 23, 1985 date, the claims based on these grievances are not time-barred.

Seniority Rights

The collective bargaining agreement provides that an employee loses is seniority rights after five years of continuous lay-off or after a period equal to his total seniority whichever is lesser. These seniority rights include a right to hiring perference to laid-off employees who apply for positions and meet local hiring requirements in other Budd Company plants. In addition, an employer

retains perferential rehire rights for a minimum period of 36 months, even if his seniority is less than 36 months.

When the 21 plaintiffs wrote to The Budd Compaby on February 22, 1985, to request employment, fifteen of them had already lost their seniority rights, including the right to assert a breach of the collective bargaining agreement. Moreover, the preferential hiring provisions applied only to "seniority employees." Plaintiff Willie Ballard lost his status as a seniority employee on October 23, 1984 after he had been on continuous lay-off for five years. Plaintiff Willie Bingham's seniority rights expired on October 29, 1984, two years after his lay-off. Because plaintiff Joyce Clark was laid off of December 5, 1979 after being employed for only two and a half years, she would have lost all

seniority on Junce 6, 1982 but her year minimum perioo for perferential hiring rights expireo on December 5, 1982. Joseph Cruz lost his seniority rights on May 28, 1984 after being on continuous lay-off for a five year perioo. Louis Cruz also lost his seniority on May 28, 1984 after being on five years of continuous lay-off. Michael Dawson lost his seniority in April of 1982 and his three-year preferential hiring rights perioc expired in October of 1982. Plaintiff Melvin R. Page lost seniority on or about September 11, 1983 and his three-year preferential hiring rights period expireo on or about June 6, 1983. John Perkins' seniority was lost on November 15, 1984 after he hao been on continuous lay-off for five years. Willie Smith lost seniority on September 30, 1984, five years after his lay-off. jerome Tyrone lost seniority rights on January 9,

1985, five years after his lay-off. Alfred Volk's seniority rights expired on November 2, 1984, five years after his lay-off. Robert Walker's seniority rights expired on November 16, 1984, five years after his lay-off. Robert Weems seniority rights expired on November 19, 1984, five years after his lay-off. Leroy Williams' seniority rights expired on November 5, 1984 five years after his lay-off. Milton Wilson's seniority rights expired on September 10, 1984, five years after his lay-off.

After their seniority status period and the three-year preferential hiring rights period had expired, these employees were no longer members of the bargaining unit and were no longer covered by the provisions of the collective bargaining agreement. Thus, when they requested re-employment on

February 22, 1985, The Budd Company was, by virtue of the collective bargaining agreement, under no special obligation to hire them. Of course, it owed these applicants the duty to refrain from such illegal practices as racial discrimination but only because this hiring restraint is imposed by law, indepent of any collective bargaining provision. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 181 n.20 (1971). These employees have no standing to assert that a breach of the collective bargaining agreement occurred at a time when they were no longer seniority employees of The Budd Company and therefore, were not parties to the agreement. However, plaintiffs Henry C. Adams, Robert Bernal, Geroge Berry, Willie J. Cornelius, Malcolm Tucker, and Emanuel Williams were bargaining unit employees and had preferential hiring

rights when they applied for employment on February 22, 1985.

Duty of Fair Representation

Employees seeking a remedy for alleged breaches of the collective bargaining agreement between their union an their employer must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before they may maintain a suit against their employers under Sec. 301. Clayton v. International Union, 451 U.S. 679, 682 (1981). Once a union makes a final decision on the employees charge that the employer breached the collective bargaining agreement, the employee may not litigate the merits of his grievance unless he can show that the grievance process was somehow subverted. Most often, this is done by

showing that the union breached its duty to fairly represent the employee in the grievance procedure. Vaca v. Sipes, 306 U.S. 171 (1967). If the employee cannot prove such a breach, his Sec. 301 claim is barred. Huffman v. Westinghose Electric Corp., 752 F.2d 1221, 1223, (7th Cir. 1985).

Thus, before the plaintiffs may pursue their breach of contract claim against The Budd Company in the present case, they must show that the Union breached its duty to fairly represent these employees when the Union failed to respond to the plaintiffs' letter of grievance dated April 6, 1985. To show a breach of the duty of fair representation, an employee "bears the substantial burden" of pleading and proving that the union deliberately and unjustifiably refused to represent him. Rupe v. Spector Freight Systems, Inc., 679

F.2d 685, 691 (7th Cir. 1982); Graf v. Elgin, Joliet and Eastern Railway Co., 697 F.2d 771, 778 (7th Cir. 1983). This requirement of showing "intentional misconduct" by the union applies to all duty of fair representation cases and requires the plaintiff to show "substantial evidence of fraud, deceitful action or dishonest conduct" by the union. Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (7th Cir. 1981).

In the present action, the plaintiffs assert that the union breached the duty of fair representation by failing to file a grievance in response to their letter of April 4, 1985. In cases arising out of a union's administration of the grievance system "courts may enforce the duty of a jnion to fairly represent an employee only when union conduct breaching that duty is intentional, invidious, and directed at the

employee." Swatts v. United Steelworkers of America, No. 85-2688, slip op. at 6 (7th Cir. Dec. 19, 1986) (quoting Hoffman, 658 F.2d at 520). See Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983); Superczynski v. P.T.O. Services, Inc., 706 F.2d 200, 202 (7th Cir. 1983); Canon v. Consolidated Freightways Corp., 524 F.2d 290, 293 (7th Cir. 1975).

In Hoffman, the court specifically held that a union's failure to pursue a grievance in a timely manner is insufficient to state a breach of the union's duty to the employee. 658 F.2d at 5222-23. Also, in Graf, the court upheld the district court's grant of summary judgment for the defendant union because the plaintiff "was not able to show any motive for [the union's representative's] trying to do him in -- personal animosity, union politics, or anthing else." 697 F.2d

at 777. Recently, the Seventh Circuit reviewed the standard of "intentional misconduct" in these cases and, after a thorough and detailed analysis of the relevant policy considerations, reaffirmed its commitment to it. Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (1986).

Applying this standard to the case before it, the court finds that plaintiffs have failed to demonstrate the requisite intentional misconduct on the part of the Union. When construing all facts in the light most favorable to plaintiff, the court finds that plaintiffs can demonstrate that the union's conduct, at worst, amounted to gross negligence; but, "gross negligence is not a basis for liability." Camacho, 786 F.2d at 244. Summary judgment is appropriate only where the court is satisfied that the moving party has met its

burden of establishing that there exists no genuine issue with respect to any material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; see Box v. A & P Tea Co., 772 F.2d 1372, 1375 (7th Cir. 1985); Thornton v. Evans, 692 F.2d 1064, 1074 (7th Cir. 1982). Additionally, the court must view the evidence submitted by the movant in the light most favorable to the non-moving party. P.H. Glatfelter C. v. Voith, Inc., 784 F.2d 770, 774 (7thCir. 1986); Egger v. Phillips, 710 F.2d 292, 296 (7th Cir.), cert. denied, 464 U.S. 918 (1983). However, the plan language of Fed.R.Civ.P. 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of

proof at trial. Celotex Corp. v. Catrett, 106 s.Ct. 2548 (1986).

Giving the plaintiffs the benefit of every reasonable inference, the facts reveal that the plaintiffs notified the Union on April 6, 1985 that their employment applications had been rejected. When the Union did not respond to their letter, the plaintiffs construed the failure to respond as a refusal to pursue their grievance and began preparing this lawsuit. The plaintiffs have failed to present any evidence whatsoever to suggest that the Union engaged in fraud, deceitful action or dishonest conduct." Hoffman, 658 F.2d at 522. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to good faith and honesty of pupose in the exercise of its discretion." Ford Motor Co. v.

Ruffman, 345 U.S. 330, 338 (1953). However, "[m]ere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation." Swatts, slip op. at 6 (quoting NLRB v. American Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980). The actions of the union and its officials do not meet the level of deliberate and extremely reckless conduct envisioned by the Seventh Circuit in Camacho and Graf.

The plaintiffs have failed to establish any facts to show a breach of duty of fair representation. Because the showing of a breach of the Union's duty of fair representation is an element essential to the plaintiff's claims against both the Union and The Budd Company must fail.

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The defendants assert that the plaintiffs' membership in this Committee should be taken as established because the plaintiffs failed to respond or object to a request for admission asking all of the plaintiffs to admit that "Plaintiff was previously a member of an organization called The Committee of Former Budd Company Employees." However, this request for admission was made only three days before the close of discovery. Requests for discovery must be made in sufficient time to allow the opposing party to respond before the termination of discovery. Discovery requests not filed in sufficient time to allow the opponent to respond within the discovery period are untimely and the opponent is under no duty to comply with this untimely discovery request. Thus, the plaintiffs' failure to respond or object to the request for admission is not deemed an admission because the request for admission was untimely filed.

However, the plaintiffs' membership in this Committee of Former Budd Company Employees is a fact which must be taken as true because the plaintiffs have failed to file any submissible summary judgment materials to rebut the deposition testimony of Emmanuel Williams who stated that all of the plaintiffs belonged to the Committee. E. Williams Dep., p. 18-19.

CONCLUSION

Because The Budd Company and the Union defendants have shown that there exists no genuine issue as to any material fact and that they are entitled to judgment as a matter of law, the defendants' Motions for Summary Judgment are hereby GRANTED. The Clerk of the Court is DIRECTED to enter judgment accordingly. The plaintiffs' Cross-Motion for Summary Judgment is ORDERED STRICKEN from the record.

ENTER: February 9th, 1987

/s/ _____
JAMES T. MOODY, JUDGE, UNITED STATES DISTRICT COURT

APPENDIX E

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Weems, Robt.	2/22/85	4/6/85 7/10/84 3/7/84 3/26/84
Walker, Robt.	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Wms, Emanuel	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Wms., Leroy	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Wilson, Milton	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Volk, Alfred	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Humphrey, Curtis	2/22/85 9/83; 2/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Jackson, L.M.	2/22/85 9/83; 1980	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 10/9/83
Jenkins, Leon	7/10/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 3/29/84
Kennedy, Bennie	7/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Leggett, Ronald	2/23/85 9/3/83	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 3/29/84
Montgomery, M.	2/23/85 12/82	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Nedoff, Jerome	2/23/85	4/6/85
	12/27/84	2/23/85
	7/84	7/10/84
		3/7/84
		3/26/84
		2/29/84
Page, Melvin	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Perkins, John	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Smith, Willie	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
Tucker, Malcolm	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84
		2/29/84
Tyron, Jerome	2/22/85	4/6/85
		2/23/85
		7/10/84
		3/7/84
		3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Adams, Henry, Jr.	8/82 2/20/85 8/23/84 2/22/85	3/7/84 3/26/84 7/10/84 7/16/84 4/6/85
Ballard, Willie	10/25/84 10/26/84 1/1/84 6/18/84 2/84 before Oct. 1984; after Nov. 1, 1984	4/6/85
Bernal, Robert	10/1/81 10/25/84	6/6/85 2/23/85 3/7/84 3/26/84
Berry, George	2/22/85	4/6/85
Bingham, Willie	6/19/85?	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84 2/29/84
Cornelius, Willie	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Clark, Joyce	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84

PLTF'S. NAME	APPLI. DATES	GRIEV. DATES
Dawson, Michael	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Cruz, Joseph	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Cruz, Louis, Jr.	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Donald, Howard	2/22/85	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Donald, Lillie	7/10/84	4/6/85 2/23/85 7/10/84 3/7/84 3/26/84
Gilbert, Carolyn	7/10/84 1982; 1983; 1984;	4/6/85 2/23/85 7/10/84 3/7/84 2/11/83 3/26/84